KERAJAAN MALAYSIA

v.

BEYOND GATEWAY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-21-53-2001]
15 FEBRUARY 2003

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Rules of the High Court 1980, O 56 r. 11 - Income tax - Whether court proper forum to hear grievance of tax due and recoverable - Whether appeal to be heard by special commissioners of income tax instead - Income Tax Act 1967, s. 99 - Summary judgment - Rules of the High Court 1980, O 14 - Whether registrar correct in granting application*

Pursuant to O. 56 r. 11 of the Rules of the High Court 1980 ('RHC'), the defendant appealed to the judge in chambers *vide* encl 11 against the decision of the senior assistant registrar in granting the plaintiff's application for a summary judgment under O. 14 of the RHC. The plaintiff had sought under s. 106 of the Income Tax Act 1967 ('the Act') to recover tax due and recoverable from the defendant for year of assessment 1998.

Held:

[1] Pursuant to s. 103 of the Act, tax becomes due and payable upon service of the notice of assessment and the court is not the correct forum to entertain any plea by the defendant that the amount of tax was excessive, incorrectly assessed or under appeal. Under s. 99 of the same, the defendant may appeal to the special commissioners of income tax if aggrieved by the assessment. (p 539 b)

[2] The senior assistant registrar was right when she allowed the plaintiff's application for a summary judgment in encl 7 as the defendant had failed to establish a single triable issue that ought to proceed to full trial. (p 539 d-e)

[Enclosure 11 dismissed with costs.]

Case(s) referred to:

Addl CIT v. Jay Engineering Works Ltd [1978] 113 ITR 389 (Delhi) ***(refd)***

Attorney General For The Strain Settlements v. Pang Ah Yew [1934] MLJ 184 ***(refd)***

Blundell v. Rimmer [1971] 1 All ER 1072 ***(refd)***

Burns v. Devon's Iron Works Ltd [1961] SC 102 ***(refd)***

C Vasantlal & Co [1962] 45 ITR 206 ***(refd)***

Central Bank of India Ltd v. Guardian Assurance Co Ltd [1936] MLJ Rep 131 ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 HC ***(refd)***

CIT v. East Coast Commercial Co Ltd [1967] 63 ITR 449 SC ***(refd)***

Cooper v. Hall [1968] 1 WLR 360 ***(refd)***

Dhakeswari Cotton Mills Ltd v. CIT [1954] 26 ITR 775 SC ***(refd)***

Government of Malaysia v. Lee Tain Tshung [1991] 2 CLJ 1520; [1991] 2 CLJ (Rep) 664 HC ***(refd)***

Harkness v. Bell's Asbestos and Engineering Ltd [1976] 2 QB 729 ***(refd)***

Hassan & Anor v. Wan Ishak & Ors [1961] 27 MLJ 45 ***(refd)***

Horst Koch v. Michael Schaefer [1997] 4 CLJ Supp 500 HC ***(refd)***

Kalyankumar Ray v. CIT [1991] 191 ITR 634 SC ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Krakauee v. Katz [1954] 1 All ER 244 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor [1999] 1 CLJ 526 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(refd)***

Motipur Zamindari Co (P) Ltd v. Agri ITO [1972] 83 ITR 778 ***(refd)***

Mriganka Mohan Sur v. CIT [1979] 120 ITR 529 (Cal) ***(refd)***

Muniandy & Anor v. Muhammad Abdul Kader & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

Nicholl v. Allen [1862] 31 LJ QB 283 ***(refd)***

S Mariappan v. Government of Malaysia [1983] 2 MLJ 340 FC ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1996] 2 CLJ 716 SC ***(refd)***

Seth Gurmukh Singh [1994] 12 ITR 393 (Lahore) ***(refd)***

Sun Man Tobacco Co Ltd v. Government of Malaysia [1973] 2 MLJ 163 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 25(1)

Income Tax Act 1967, ss. 2(1), 99, 103A(2), 106(1), 134, 136(5), 142(1)

Inland Revenue Board of Malaysia Act 1995, ss. 2, 3, 4(1), (4), (5), 10, 21, 22, 29, 30

Rules of the High Court 1980, O. 1A, O. 2, O. 14, O. 56 r. 1(1), O. 73 r. 5(2)

For the plaintiff - Hazlina Hussain; Inland Revenue Board, Malaysia
For the defendant - Adrian SK Han; M/s Chee, Fabli & Adrian Han

Reported by M Maheswaran

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal to the judge in chambers by the defendant as seen in encl. 11 under O. 56 r. 1(1) of the Rules of the High Court 1980 ("RHC"), and that Order states as follows:

> An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

Now, an appeal of this nature proceeds by way of a rehearing and I am required to treat the whole matter as if it was heard for the very first time. Since I should consider the appeal in encl. 11 as a rehearing, any party to this appeal is entitled to raise any preliminary objection on any point of law that can be envisaged (*Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444). But, this is only a general principle and there is a caveat to it of which I will allude to later. There is also another salutary principle. It is this. That in the course of hearing this appeal in encl. 11, I am not constrained nor fettered nor shackled by the exercise of discretion on the part of the senior assistant registrar who had earlier heard the submissions of the parties in regard to the plaintiff's application for summary judgment under O. 14 of the RHC as seen in encl. 7 (*Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; *Horst Koch v. Michael Schaefer* [1997] 4 CLJ Supp 500; *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; and *Blundell v. Rimmer* [1971] 1 All ER 1072 at 1076, [1971] 1 WLR 123 at 127). Another salutary principle is this. Once the senior assistant registrar has heard and dismissed the application, a second application cannot be made before the senior assistant registrar and the only recourse, if this were to happen – just like the present matter at hand, is to appeal against the decision of the senior assistant registrar to the judge in chambers under O. 56 of the RHC (*Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor* [1999] 1 CLJ 526).

I did say that the party to the appeal is entitled to raise any preliminary objection on any point of law that can possibly be envisaged. I also said that there is a caveat to this. I will now elaborate. It is entirely at the

discretion of the judge in chambers who hears the appeal whether to hear fresh points of law or issues that were not raised before the senior assistant registrar. Judges are generally reluctant to allow points of law or issues to be raised before them when they were not raised before the senior assistant registrar (*Attorney General For The Straits Settlements v. Pang Ah Yew* [1934] MLJ 184; *Central Bank of India, Ltd. v. Guardian Assurance Co. Ltd.* [1936] MLJ Rep 131; and *Hassan & Anor v. Wan Ishak & Ors* [1961] 27 MLJ 45). But, as I said, judges still retain the discretion to hear points of law or issues not raised earlier before the senior assistant registrar. It is here that judges should be vigilant and should ascertain whether the issue is one of jurisdiction or is in relation to illegality or a mere procedural irregularity. As a matter of course, judges would exercise its discretion in favour of hearing the issues pertaining to jurisdiction and illegality but not in regard to a procedural irregularity because the latter could be waived under O. 2 of the RHC. Furthermore, every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without causing an injustice (*Harkness v. Bell's Asbestos and Engineering Ltd* [1976] 2 QB 729 at 736). At any rate, it has been said that the failure to raise those points which I had alluded to could be regarded as a waiver (*S. Mariappan v. Government Of Malaysia* [1983] 2 MLJ 340, FC; *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116, SC; *Burns v. Devon's Iron Works Ltd* [1961] SC 102; *Krakauee v. Katz* [1954] 1 All ER 244; and *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, SC). It is significant to note that the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713 categorically held that the list of cases are not closed and that the appellate court will always permit a new point to be raised for the very first time so long as the interests of justice requires it to be done. That would indeed cap it all up and it brings justice to the fore.

Exercising my judicial discretion and for the sake of justice, I am amenable to hear the preliminary objections advanced by the defendant. I will do so now.

Preliminary Objections

There were two preliminary objections advanced by the defendant and they may be stated in this way:

(1) Whether the deponent by the name of Mat Radzi bin Mat Sayed, a senior assistant examiner, has the authority to affirm an affidavit on 27 June 2001 as seen in encl. 6 and to affirm an affidavit in reply

number two on 30 March 2002 as seen in encl. 21 bearing in mind that these two affidavits were in support of the plaintiff's application for summary judgment against the defendant in the sum of RM16,161,412.42 together with interest at the rate of 8% per year from the date of judgment till the date of realisation and costs?

(2) Whether the certificate marked as exh. "RS1" which was annexed to the affidavit in reply number two of Mat Radzi bin Mat Sayed as reflected in encl. 21, which certificate was signed by the former Director General of Inland Revenue in the person of Najirah bt. Mohd. Tassaduk Khan is still valid and subsisting?

I shall now examine these two preliminary objections in quick succession.

The First Preliminary Objection

It cannot be denied that Mat Radzi bin Mat Sayed, at the material time, held the post of a senior assistant examiner and that he has been duly authorised by the Director General of Inland Revenue "to exercise or assist in exercising any function of the Director General under the Income Tax Act 1967" as provided for and as envisaged under s. 136(5) of the Income Tax Act 1967. Now, s. 136(5) of the Income Tax Act 1967 enacts as follows:

136 Delegation of Director General's functions

(5) The Director General may by writing under his hand authorise any public officer (or any employee of the Inland Revenue Board of Malaysia) (subject to any exceptions or limitations contained in the authorisation) to exercise or assist in exercising any function of the Director General under this Act which is exercisable under subsection (4) by Senior Assistant or Assistant Directors of Inland Revenue.

An "authorised officer" is defined in s. 2(1) of the Income Tax Act 1967 and it is as follows:

2 Interpretation

(1) 'authorised officer' means, within the scope of his authority:

(a) an officer authorised by section 136(1) to (4) to exercise any function of the Director General; or

(b) an officer authorised under section 136(5) to exercise or assist in exercising any such function.

Without going into the legal semantics, I must now refer to s. 106 of the Income Tax Act 1967 and that section enacts as follows:

106 Recovery by suit

(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2) The Director General and all authorised officers shall be deemed to be public officers authorised by the Minister under section 25(1) of the Government Proceedings Ordinance, 1956, in respect of all proceedings under this section.

[(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under [section 103(4), 103(5), 103(5A), 103A(4), 103A(5), 103A (6), 103A(7), 103A(8) or 103A(9).]

(It is to be noted that sub-s. (3) was amended by the Income Tax (Amendment) (No 2) Act 1999 (Act A1069) s. 10 with effect from 1 January 2000 and shall have effect for the year of assessment 2001 and subsequent years of assessment. Editorial Note: For special provision, see Part III (s. 17) of the Income Tax (Amendment) (No 2) Act 1999 (Act A1069) in s. 120 post.)

And it must be read with s. 25(1) of the Government Proceedings Act 1956 (Act 359) which enacts as follows:

Apperance of public officers

25. (1) Any public officer authorised by a Minister in respect of proceedings by or against the Federal Government or by the State Secretary, or, in the case of the States of Sabah and Sarawak, by the State Attorney General, in respect of proceedings by or against the Government of a State, to act for such Government in respect of any civil proceedings may appear as advocate on behalf of such Government and shall be deemed to be the recognised agent of such Government by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such Government.

(2) An authorisation under subsection (1) may be special in respect of any particular proceedings or general in respect of all proceedings or in respect of all proceedings of a particular class.

Taken in its correct perspective and after taking into account the provisions of the statutes as alluded to above, Mat Radzi bin Mat Sayed certainly had the authority to affirm those affidavits as seen in encls. 6 and 21. But it was argued, on behalf of the defendant, that the affidavits in encls. 6 and 21 did not comply with O. 73 r. 5(2) of the RHC. Was this really true? Now, it is germane to reproduce O. 73 r. 5(2) of the RHC and I do so now:

> (2) Where an application is made by the Government under Order 14 rule 1, Order 14 rule 5, or Order 81 rule 1, the affidavit required in support of the application may be made by:
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> (a) the solicitor acting for the Government; or
>
> (b) an officer duly authorised by the solicitor so acting or by the department concerned;
>
> and the affidavit shall be sufficient if it states that in the deponent's belief the applicant is entitled to the relief claimed and there is no defence to the claim or part of a claim to which the application relates or no defence except as to the amount of any damages claimed.

And I have this to say. That an application by the Government under O. 14 of the RHC – just like the application of the plaintiff in encl. 7, may be made by three categories of persons, namely:

(a) the solicitor that is acting for the Government; or

(b) an officer duly authorised by the solicitor so acting; or

(c) an officer duly authorised by the department concerned.

In the context of the present appeal, the "department concerned" would refer to the Inland Revenue Board of Malaysia established under the Inland Revenue Board of Malaysia Act 1995 (Act 533) as defined in s. 2(1) of the Income Tax Act 1967 wherein Mat Radzi bin Mat Sayed is attached to as a senior assistant examiner. It must be borne in mind that with effect from 1995, the Inland Revenue Department has been corporatised under the Inland Revenue Board of Malaysia Act 1995 (Act 533) and it is now known as the Inland Revenue Board of Malaysia.

It is necessary, at this juncture, to refer to the relevant sections of the Inland Revenue Board of Malaysia Act 1995 (Act 533) (hereinafter referred to as the "IRB Act"). Section 2 of the IRB Act defines "Director General" to

mean "the Director General of Inland Revenue referred to in s. 134 of the Income Tax Act 1967 (Act 53)." Section 3 of the IRB Act establishes the Inland Revenue Board of Malaysia and it is worded in this way:

> **Establishment of the Inland Revenue Board**
>
> 3. There is hereby established a body corporate by the name 'Inland Revenue Board of Malaysia' with perpetual succession and a common seal, and which may sue and be sued in its name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Board upon such terms as it deems fit.

The vesting provisions of the IRB Act are certainly useful and beneficial to the Inland Revenue Board of Malaysia because "the Minister may, from time to time, by order published in the Gazette, appoint a vesting date and on such date all property, rights, or liabilities of the Government of Malaysia specified by the Minister in such order shall, by virtue of this Act, be transferred to and vested in the Board without any conveyance, assignment or transfer whatever" (see s. 4(1) of the IRB Act). And by s. 4(4) of the IRB Act, every right and liability vested by virtue of sub-s. (1) in the Board may, on and after the vesting date, be sued on, recovered or enforced by or against the Board in its own name and it shall not be necessary for the Board or the Government of Malaysia to give notice to the person whose right or liability is affected by the vesting under sub-s. (1). Furthermore, by way of s. 4(5) of the IRB Act any pending legal proceedings by or against the Government of Malaysia which relate to any property, right or liability transferred to and vested in the Board by virtue of sub-s. (1) may, on and after the vesting date, be continued by or against the Board. It would thus appear that the vesting provisions in the IRB Act give or transfer all the rights and liabilities of the Government of Malaysia to the Board. In short, the Inland Revenue Board of Malaysia takes over all the properties, all the rights and all the liabilities of the Government of Malaysia on the vesting date. Section 10 of the IRB Act is another relevant provision to refer to. That s. 10 enacts as follows:

Functions of the Board

10. The functions of the Board shall be:

(a) to act as agent of the Government and to provide services in administering, assessing, collecting and enforcing payment of income tax, petroleum income tax, real property gains tax, estate duty, stamp duties and such other taxes as may be agreed between the Government and the Board;

(b) to advise the Government on matters relating to taxation and to liaise with the appropriate Ministries and statutory bodies on such matters;

(c) to participate in or outside Malaysia in respect of matters relating to taxation; and

(d) to perform such other functions as are conferred on the Board by any other written law.

While ss. 21 and 22 of the IRB Act provide protection from personal liability and the stipulation of being public servants; and these sections will now be reproduced:

Protection from personal liability

21. No suit or other legal proceedings shall lie personally against any member, officer or employee of the Board or any other person under the direction of the Board for anything which is done in good faith or intended to be done in the execution or purported execution of this Act.

Public servants

22. All members of the Board and its committee and all officers, employees or agents of the Board shall be deemed to be public servants within the meaning of the Penal Code [574].

Of crucial importance would be ss. 29 and 30 of the IRB Act. If there is any doubt that the Inland Revenue Board of Malaysia has the legal authority to institute any action or any legal proceeding in respect of tax in the name of the Government of Malaysia, it is now set to rest. I will now reproduce these two sections in quick succession:

PART VI
GENERAL

No proceedings against the Board as agent of Government

29. (1) No action or legal proceedings shall be brought against the Board in respect of any matter relating to any tax for which the Board is acting as agent of the Government.

(2) Any action or legal proceedings in respect of any matter relating to tax shall be instituted by or against the Government.

Proceedings conducted by officers of the Board

30. (1) Proceedings in respect of any offence under this Act or any regulations made thereunder or any of the Acts specified in the Second Schedule or any subsidiary legislation made under any of those Acts may with the consent of the Public Prosecutor, be conducted by an officer of the Board who is authorised to conduct such proceedings by the Director General.

(2) Notwithstanding the provisions of any written law, a legal officer as defined in the Government Proceedings Act 1956 [Act 359] or a legal officer of the Board who has been admitted as an advocate and solicitor under the Legal Profession Act 1976 [Act 166] may appear in any civil proceedings involving the Board or any person holding any of the offices specified in the Third Schedule in the performance of his functions under any written law so specified, and may make and do all acts and applications in respect of such proceedings on behalf of the Board or such person, as the case may be.

And the Third Schedule makes reference to, *inter alia*, the Director General of Inland Revenue under the Income Tax Act 1967.

The upshot of it all would be this. There is no room to challenge the legality of the present proceedings notwithstanding the fact that the Inland Revenue Department has been corporatised and is now known as the Inland Revenue Board of Malaysia.

Now, still on the first preliminary objection, it is germane to mention that the word "may" that appears in O. 73 r. 5(2) of the RHC is said to be "permissive" and that it will not generally be held to be mandatory (*Nicholl v. Allen* [1862] 31 LJ QB 283; and *Cooper v. Hall* [1968] 1 WLR 360). Being "permissive" and not "mandatory", the word "may" should be construed in favour of the plaintiff. Thus, the affidavits in encls. 6 and 21 may be made by an officer duly authorised by the department – which must necessarily mean an officer duly authorised by the Inland Revenue Board of Malaysia. In the present appeal, the officer would be none other than Mat Radzi bin Mat Sayed who held the post of a senior assistant examiner at the material time. In my judgment, Mat Radzi bin Mat Sayed had the authority to affirm those two affidavits as seen in encls. 6 and 21. There are no two ways about it.

Be that as it may, it is germane to mention that under O. 73 r. 5(2) of the RHC, the affidavit that was affirmed by Mat Radzi bin Mat Sayed in encl. 6 sufficiently stated his belief that the plaintiff herein is entitled to the relief claimed and that there is no defence to the claim or part of the claim to which the application for summary judgment in encl. 7 is related to. In para. 16 of encl. 6, Mat Radzi bin Mat Sayed deposed as follows:

> I verily believe and I am advised to say that the defendant has no defence to the plaintiff's claim and that the plaintiff is entitled to the relief claimed. For that reason, the plaintiff prays that summary judgment be allowed under Order 14, rule 1(1) of the RHC for:
>
> 16.1 the sum of RM16,161,412.42;
>
> 16.2 interest on the sum of RM16,161,412.42 at the rate of 8% per annum from the date of judgment to the date of realisation;
>
> 16.3 costs of this action; and
>
> 16.4 any other relief which this court thinks suitable.

And this very averment falls squarely within the requirements as set out in O. 73 r. 5(2) of the RHC. That would be the effect of the affidavit in encl. 6 of Mat Radzi bin Mat Sayed.

For these reasons, I would, without hesitation, refuse to entertain the first preliminary objection forthwith.

The Second Preliminary Objection

I must hold that the certificate issued by the Director General in favour of Mat Radzi bin Mat Sayed to be valid in law under s. 136(5) of the Income Tax Act 1967 notwithstanding the fact that that certificate was issued by the then Director General in the person of Najirah bt Mohd Tassaduk Khan on 8 August 1996. The validity of that certificate cannot be doubted; its validity still subsists to this very day. My concern would solely be the capacity and the power of the individual who signed that certificate as seen in exh. "RS1" of encl. 21. For clarity, I will now reproduce that certificate in its original text:

AKTA CUKAI PENDAPATAN 1967 (AKTA 53)
SURAT KUASA DI BAWAH SUBSEKSYEN 136(5)

> BAHAWASANYA Saya Najirah bt. Mohd. Tassaduk Khan, Ketua Pengarah Hasil Dalam Negeri, dengan ini memberi kuasa kepada MAT RADZI BIN MAT SAYED, NO. K.P. 0997108, seorang pegawai Lembaga Hasil Dalam Negeri Malaysia, untuk menjalankan fungsi saya di bawah Akta Cukai Pendapatan 1967 berkenaan mana-mana prosiding sivil.
>
> Bertarikh 8 Ogos, 1996.

Sgd. (Illegible)
[NAJIRAH BT. MOHD. TASSADUK KHAN]
Ketua Pengarah Hasil Dalam Negeri,
MALAYSIA.

The fine lady who signed the certificate held the post of a Director General and it is that post that is being alluded to in many parts of the Income Tax Act 1967. Even an Acting Assistant Director General who signed the certificate under s. 142(1) of the Income Tax Act 1967 was held by the Federal Court in the case of *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 2 MLJ 119, FC, to be valid. At the headnote, at Held (1), at p. 120, it reads as follows:

> The very general words of section 136 of the Act, read with section 7 of the Interpretation Act, 1967, were sufficient to permit an acting Director-General to sign and to issue a certificate under section 142 (1) of the Act for and on behalf of the Director-General.

In the body of the judgment, Edgar Joseph Jr. FCJ (delivering the judgment of the Federal Court) aptly said at p. 125 of the report:

> As for the first of the above defences, in our view, the very general words of section 136 of the Act, read together with section 7 of the Interpretation Act 1967, are sufficient to permit an acting Director General in the position of Puan Norlina bte Zainal to sign and to issue a certificate under section 142(1) of the Act for and on behalf of the Director General.

It is patently clear that that certificate that was signed by the Director General is still valid and subsisting to this very day.

Justice Of The Matter

At any rate, these two preliminary objections must now be viewed in the context of the new O. 1A of the RHC. That new Order states as follows:

> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

and I should not entertain the defendant's feeble and insignificant technical objections especially in view of the fact that the defendant has failed to establish any triable issue against the plaintiff's summary judgment application in encl. 7.

To The Heart Of The Matter

By way of encl. 7, the plaintiff sought under s. 106(1) of the Income Tax Act 1967 against the defendant to recover tax due and payable under a Notice of Assessment for the Year of Assessment 1998 amounting to a daunting figure of RM16,161,412.42. Now, pursuant to s. 103 of the Income Tax Act 1967, tax becomes due and payable upon service of the Notice of Assessment and the court is not the correct forum to entertain any plea by the defendant that the amount of tax is excessive, incorrectly assessed or under appeal. I say and I so say that if a defendant is aggrieved by the assessment, the defendant may appeal to the Special Commissioners of Income Tax as provided for under s. 99 of the Income Tax Act 1967 (*Sun Man Tobacco Co. Ltd v. Government of Malaysia* [1973] 2 MLJ 163, FC). Once a certificate is issued under s. 142 of the Income Tax Act 1967 it "shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount." A reading of the case of *Government of Malaysia v. Lee Tain Tshung* [1991] 2 CLJ 1520; [1991] 2 CLJ (Rep) 664 is highly recommended. The defendant in its para. 3 of its defence categorically stated that it has received the Notice of Assessment. That being the case, s. 103 of the Income Tax Act 1967 applies and the senior assistant registrar was right when she allowed the plaintiff's application for summary judgment in encl. 7 because the defendant had failed to establish a single triable issue that ought to proceed to full trial. The appeal of the defendant in encl. 11 must fail. And I so order that it be so.

I had no choice but to dismiss encl. 11 with costs. I did just that.

Addendum

The liability to pay tax is the statutory liability under the Income Tax Act 1967. That liability crystallises for every tax payer on a yearly basis. The assessment merely quantifies the true liability which has been crystallised and becomes due on the last day of the previous year. It is a present liability although the tax becomes payable after it has been quantified and ascertained by the assessment officer.

The income-tax authorities are strictly not bound by the rules of evidence and whatever material having evidentiary value can be taken into account and considered and that such material is to be brought to the notice of the assessee who must have an adequate opportunity to rebut the same (*CIT v. East Coast Commercial Co. Ltd* [1967] 63 ITR 449 (SC)). It is not open to debate that the assessing officer is not fettered by the technical rules of evidence and pleadings (*Dhakeswari Cotton Mills Ltd v. CIT* [1954] 26 ITR 775 (SC); *C. Vasantlal & Co.* [1962] 45 ITR 206 (SC); and *Motipur*

Zamindari Co. (P) Ltd v. Agri. ITO [1972] 83 ITR 778). The assessment officer may even act on material which has a probative value. Save that effect should be given to all the provisions found in the Income Tax Act 1967, it is my view that the law of Evidence, the law of Limitation and the principle of *res judicata* or estoppel are not applicable to the proceedings before the income tax authorities. But the assessment officer has to draw the assessee's attention to the information to be utilised by him for assessment and the officer must also ensure that the rules of natural justice are not violated (*Seth Gurmukh Singh* [1994] 12 ITR 393 (Lahore); *Addl. CIT v. Jay Engineering Works Ltd* [1978] 113 ITR 389 (Delhi); and *Mriganka Mohan Sur v. CIT* [1979] 120 ITR 529 (Cal)). It must also be stressed that the assessment officer is not entitled to make a pure guess or conjecture and he too cannot make an order without the relevant material and on a mere bare suspicion (*Dhakeswari Cotton Mills Ltd v. CIT* [1954] 26 ITR 775 (SC)).

It is said that the process of assessment would be complete when the income is computed and the tax is determined by an order in writing (*Kalyankumar Ray v. CIT* [1991] 191 ITR 634 (SC)). An order of this nature is called a Notice of Assessment or Composite Assessment. That would be a Notice in writing where the total income of the tax payer or assessee is assessed and the tax, that is payable by him or it, will be determined. It is salutary to remember that every tax payer, be it an individual or a company, must ensure that his or its tax is being paid by him or it every year. If there is delay on the part of the individual tax payer to pay his tax within thirty (30) days upon receipt of the Notice of Assessment or Composite Assessment, a penalty shall be imposed as provided for under s. 103(4) of the Income Tax Act 1967. That penalty will be in the form of 10% of the tax so unpaid that has been assessed and computed. If there is a further default of non-payment of another sixty (60) days by an individual tax payer, a further penalty of 5% of the balance unpaid will be imposed as provided for under s. 103(5A) of the Income Tax Act 1967. In so far as a company is concerned, tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not the company appeals against the assessment. This is provided for under s. 103A(2) of the Income Tax Act 1967. And that where any tax due and payable has not been paid by the company within thirty (30) days after the service of the Notice, so much of the tax that is unpaid upon the expiration of that period shall without any further notice being served be increased by 10% of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under the Income Tax Act 1967. Again, if there is any balance remaining unpaid upon the expiration of sixty (60)

days from the date of such increase the company shall without any further notice being served be further increased by a sum equal to 5% of the balance unpaid, and that sum shall be recoverable as if it were tax due and payable under the Income Tax Act 1967. That would be the rigours, briefly, of the Income Tax Act 1967.